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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XD646

Notice of Intent to Issue Guidelines

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice, request for public comment.

SUMMARY: The Marine Mammal Protection Act (MMPA) allows for persons to employ measures to deter marine mammals from damaging fishing gear and catch, damaging personal or public property, or endangering personal safety, as long as these measures do not result in death or serious injury of marine mammals. The MMPA also allows the Secretary of Commerce, through NOAA's National Marine Fisheries Service (NMFS), to develop national guidelines on safely deterring marine mammals under NOAA's jurisdiction (e.g., whales, dolphins, seals, and sea lions). To inform development of these national guidelines, NMFS requests input on which deterrents the public would like NMFS to evaluate and consider for approval. Any subsequent national guidelines for safely deterring marine mammals would then be released for public notice and comment as required by the MMPA. Such national guidelines would likely be tailored to each species group (pinnipeds, large cetaceans, and small cetaceans) as differences in physiology and behavior would affect whether a deterrent is appropriate for one or more species group. National guidelines would also address relevant implementation considerations. Deterrents could be considered "passive" or "active" in nature. Deterrents may include physical barriers, acoustic deterrent and harassment devices, visual repellents, boat hazing, noisemakers, and

physical contact. For each deterrent device or technique submitted to NMFS for consideration and evaluation, NMFS requests information on the specifications (e.g., source and frequency levels, pulse rate, type of fencing, size of flags, etc.) for each deterrent or technique, which marine mammal species or species group (large cetaceans, small cetaceans, pinnipeds) would be deterred, how a deterrent would be employed (e.g., attached to fishing gear, launched some distance from a marine mammal), any evidence that the deterrent will not result in mortality or serious injury, and any other implementation considerations. This information will help NMFS determine which devices or techniques are appropriate for the development of guidelines and specific measures for safely deterring both non-ESA listed and ESA listed marine mammals.

DATES: Written comments from interested parties on the non-lethal deterrents for NMFS' consideration must be received at the appropriate address or fax number (see ADDRESSES) no later than 5 p.m. Eastern daylight time on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by NOAA-NMFS-2014-0146, by any of the following methods during the 30-day comment period:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal www.regulations.gov. To submit comments via the e-Rulemaking Portal, first click the "submit a comment" icon, then enter NOAA-NMFS-2014-0146 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the "Submit a Comment" icon on the right of that line.
- **Mail:** Submit written comments to Kristy Long, Office of Protected Resources, 7600 Sand Point Way NE, Building 4, Room 2122-4, Seattle, WA 98115.
- **Fax:** 301-713-0376; Attn: Kristy Long.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Kristy Long (ph. 206-526-4792, e-mail Kristy.Long@noaa.gov).

SUPPLEMENTARY INFORMATION:

Background

The deterrence provisions of the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.) provide an exception to otherwise prohibited acts, allowing the use of measures that may deter a marine mammal from, among other things, damaging private property or endangering personal safety, so long as those deterrents do not result in the death or serious injury of a marine mammal. NMFS has defined “serious injury” as any injury that will likely result in death (50 CFR 229.2) and has further interpreted that definition and developed a process to distinguish serious from non-serious injuries (www.nmfs.noaa.gov/pr/pdfs/serious_injury_policy.pdf).

Specifically, MMPA section 101(a)(4)(A) allows for the owner of fishing gear or catch or private property, or an employee or agent of such owner, to deter marine mammals from

damaging fishing gear and catch or private property, respectively. Additionally, it allows any person to deter a marine mammal from endangering personal safety and any government employee to deter a marine mammal from damaging public property, so long as such measures do not result in mortality or serious injury of a marine mammal.

MMPA section 101(a)(4)(B) directs the Secretary of Commerce, through NMFS, to publish guidelines for safely deterring marine mammals and recommend specific measures to non-lethally deter marine mammals listed as endangered or threatened under the Endangered Species Act (ESA). Deterring marine mammals consistent with such guidelines or approved measures would not be a violation of the MMPA.

MMPA section 101(a)(4)(C) provides for the prohibition of certain forms of deterrence if NMFS determines, using the best scientific information available, and subsequent to public comment, that the deterrence measure has a significant adverse effect on marine mammals.

Types of Deterrents

Passive Deterrents

“Passive” deterrence measures are those that prevent marine mammals from gaining access to fishing gear, property, or people. The proper use of these passive deterrence devices provides for human safety and does not increase the risk of death or serious injury of marine mammals. Such measures have been most commonly deployed for deterring pinnipeds and could include rigid fencing and other fixed barriers such as gates and fence skirting, closely spaced posts, and visual deterrents (e.g., flags, pinwheels, flashing lights). For small cetaceans, modifying fishing behavior to prevent interactions is another option. For example a fishing vessel could minimize the number of turns made while trawling and reduce tow times at night.

Active Deterrents

“Active” deterrence measures introduce a stimulus into a marine mammal’s environment to dissuade an animal from interacting with property, people, or fishing gear or catch or stopping a dangerous or damaging interaction. Examples of active measures include underwater acoustic devices (e.g., pingers, seal scarers, noisemakers such as horns or whistles) that generate sounds known to be annoying but not harmful to marine mammals, physical contact such as prodding a marine mammal with blunt poles, pushing or herding an animal, and spraying water at an animal, as well as, for seals and sea lions, some light explosives to induce a startle response.

Request for Public Comment

Pursuant to MMPA section 101(a)(4)(B), NMFS intends to develop national guidelines for deterring marine mammals under NOAA’s jurisdiction (see www.nmfs.noaa.gov/pr/species/mammals). NMFS is soliciting public input on which deterrents the public would like NMFS to evaluate and consider for approval through these national guidelines. For each device or technique submitted for consideration, NMFS requests any available information on the specifications for each deterrent, which marine mammal species or species group would be deterred, how a deterrent would be deployed, and any other implementation considerations. NMFS would also appreciate any details, if known, on the nature of the interaction for which deterrence measures are being sought or already employed.

NMFS is not requesting that individuals undertake new research to inform this process. Further, please note that some devices or techniques may not be appropriate for use on certain species or in certain areas and may be subject to prohibition or permitting requirements under federal, state, or local ordinances.

For each deterrent device or technique submitted, please include information on the following:

- The intended species and/or species group (i.e., large cetaceans, small cetaceans, or pinnipeds) that could be deterred by a particular device or technique.
- Details on the nature of the interaction that warrants deterrence, including, if known, the associated marine mammal behavior (e.g., depredation of bait or catch, bycatch, begging, damage to fishing gear or property) and location of the interaction (e.g., at sea, on land, on a dock, on private property).
- A description of the device or technique, including all available manufacturer specifications of the device and photographs or graphics, if possible. For example, for acoustic deterrent or harassment devices, please include source level (e.g., decibel level (dB)), reference pressure (e.g., peak, root mean square (RMS)), frequency levels (in Hertz or kilohertz), pulse rates and duration, battery requirements, and recommended spacing. For example, one type of acoustic harassment device, a 10 kHz pinger, emits sound at 132 dB (± 4 dB) re 1 micropascal at 1 m, lasting 300 milliseconds (± 15 milliseconds), and repeating every 4 seconds (± 0.2 seconds).
- Reports, literature, or data from any field trials or pilot studies evaluating the device or technique, including any observed death or serious injury that resulted from using the device or technique.
- Any other information relative to the potential risk that a specific device or technique may have in causing the death or serious injury of a marine mammal.
- The manner in which the device or technique would be deployed. Specifically, details on how the deterrent would be attached to fishing gear (e.g., number of devices, distance between deterrents, etc.), launched at some distance, deployed on a dock or vessel, etc. For example, for acoustic pingers deployed to deter harbor

porpoises from gillnets, a 10 kHz pinger would be attached at each end of a gillnet string and at the bridle of every net within a string of nets (every 300 ft (91.44 m)).

For a physical barrier on private property intended to prevent pinnipeds from gaining access, the barrier should be made of galvanized metal to withstand the marine environment and block haul-out attempts, and the rungs should be spaced no more than 18 inches (45.72 cm) apart.

- Potential effects on other marine mammals, ESA-listed species, or the environment in the area where a deterrent would be used.
- Any other implementation considerations that NMFS should consider.

In summary, NMFS is soliciting input on which deterrents the public would like NMFS to evaluate and consider for approval through the development of national guidelines for safely deterring marine mammals. NMFS will consider these suggested deterrents and others, as appropriate, for inclusion in the guidelines and will subsequently publish any such guidelines developed as a part of this process in the Federal Register for public notice and comment, as required by MMPA section 101(a)(4)(B).

Dated: December 11, 2014.

Donna S. Wieting,
Director, Office of Protected Resources,
National Marine Fisheries Service.

